No. 86-629

IN THE

Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN M. VOLKMAN
JANET C. HANSON
WILLIAM E. HANNAFORD
Northwest Power Planning Council
850 S.W. Broadway
Portland, Oregon 97205
(503) 222-5161

AARON M. PECK
McKENNA, CONNER & CUNEO
3435 Wilshire Boulevard
Twenty-Eighth Floor
Los Angeles, California 90010
(213) 739-9100

Attorneys for Northwest Power Planning Council

Of Counsel:

STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 750-3315

FRANK W. OSTRANDER
24 Peabody Terrace
Cambridge, Massachusetts 02138
(617) 547-0230

ROGER BEERS
BEERS & DICKSON
380 Hayes Street, Suite 1
San Francisco, California 91402
(415) 861-1401

QUESTIONS PRESENTED

The Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("the Act"), authorized the states of the Pacific Northwest region of the United States to form a council, with state-appointed members, to develop and promulgate a plan for the conservation and development of the electric power resources of the region. Pursuant to that authorization, the states of the Pacific Northwest formed a council, the Pacific Northwest Electric Power and Conservation Planning Council, commonly referred to as the "Northwest Power Planning Council" ("the Council"); and the Council developed and promulgated the Northwest Conservation and Electric Power Plan (the "Plan") for such conservation and development, including model conservation standards. The questions presented in this proceeding are as follows:

1. Does the provision of the Act authorizing the formation of the Council by the states of the region and the state appointment of Council members violate the Appointments Clause (Art. II, cl. 2) of the United States Constitution?

2. Should the Plan be set aside on the ground that the Council, in promulgating the Plan, did not comply with state or federal environmental laws?

   a. Should the issue of compliance with federal environmental laws be considered by the Court when it was not raised by Petitioners in the Court of Appeals?

   b. Assuming that the Court should consider the issue of compliance with federal environmental laws, did the Council, in promulgating the Plan, violate either state or federal environmental laws?

3. Did the Council, in developing the Plan, err in its interpretation of the Act's requirement that conservation measures be economically feasible for consumers?

INDEX

Page

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Other Authorities

No. 86-629

IN THE

Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

1. The Parties.

The Petitioners in this proceeding are certain trade associations for members of, and members of, the residential real estate development industry in the Pacific Northwest.[1]

[1] The Petitioners are Seattle Master Builders Association, Homebuilders Association of Spokane, Inc., National Woodwork Manufacturers' Association, Fir & Hemlock Door Association, Shelter Development Corporation, Clair W. Daines, Inc., Conner Development Company, Donald N. McDonald, Seattle Door Company, Inc., and Homebuilders Association of Washington State (collectively, "Petitioners").

One of the Respondents in this proceeding, the Council, is an agency formed by the states of the Pacific Northwest pursuant to the compact clause of the U.S. Constitution, responsible for adopting a regional conservation and electric power plan for the Pacific Northwest. The other respondent is the United States of America ("the United States").

2. The Act and Formation of the Council.

While the electric power needs of the Pacific Northwest had historically been satisfied largely by federal agencies, the state governments of the region also wanted to play a role in, and influence the course of, Pacific Northwest electric power development.[2] Accordingly, in an effort to deal with the problem of electric energy demands that the existing hydropower-based system could not satisfy, Congress enacted the Act.[3]

[2] *See, e.g., Pacific Northwest Electric Power Supply and Conservation Act, 1979: Hearing on S. 2080 Before the Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 523-28, 626-42 (1978) (statements of Governor Judge of Montana and Governor Evans of Idaho concerning the desirability of state energy councils.)

[3] The problem of electric power shortages, which the Act was designed to address, was pressing. As the legislative history of the Act explained:

> "Coupled with conservation's economic promise is the urgent need to conserve to ease the region's almost certain power shortages in the 1980's. Current forecasts indicate that the Northwest will experience massive power shortages during any critical water year in the next decade * * *. Although it is too late to avert such shortages by building new thermal plants it is not too late to reduce the incidence and duration of such shortages through conservation. In the absence of a coordinated regional power program, it is probable that conservation efforts in the region will be too slow, too scattered, and too modest to be effective.
>
> * * *
>
> "The hearings also demonstrated that a legislative solution to the region's electric power planning problems was imperative. The certain inability of the region otherwise to resolve its problems without legislation represents a serious economic, social, and environmental threat to the region and, by implication, to other regions of the

(footnote continued on next page)

Under the Act, the federal government continues to play a significant — and, in fact, expanded — role in satisfying the electric power needs of the Pacific Northwest. For the first time, the Bonneville Power Administration ("BPA") was vested with authority to acquire the output of electric generating resources. At the same time, Congress authorized the states of the Pacific Northwest to form a compact agency for various purposes related to meeting the electric energy needs of the Pacific Northwest. That agency is the Council.

In the section dealing with the creation of the Council, the Act provided that "the consent of Congress is given for an agreement" among the states of Idaho, Montana, Oregon and Washington "pursuant to which . . . there shall be established a regional agency known as the 'Pacific Northwest Electric Power and Conservation Planning Council' which . . . shall carry out its functions and responsibilities in accordance with" the Act. The Act also states that "except as otherwise provided" in the Act, the agency "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law;" that "two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members" of the agency; and that "[t]he members and officers and employees of the . . .

(footnote continued from preceding page)

country. The continued failure to use existing resources and conservation effectively and to plan efficiently for future needs raises the potential of severe regional electric power shortages in this decade . . ." (H.R. Rep. No. 976 (Pt. I), 1980 U.S. Code Cong. & Adm. News 5992-5993.) The importance of the Act in meeting the electric power needs of the Pacific Northwest has been judicially recognized. *See, e.g., Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380 (1984); *Forelaws on Board v. Johnson*, 743 F.2d 677, 679-680 (9th Cir. 1984), *cert. denied*, ... U.S. ....., 106 S.Ct. 3293 (1986); *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1106 (9th Cir. 1984); *Public Power Council v. Johnson*, 674 F.2d 791, 792, 795 (9th Cir. 1982).

[agency] shall not be deemed to be officers or employees of the United States for any purpose." (16 U.S.C. §839b(a)(2),(3).)[4]

The Act contemplated that each member of the Council would, within the parameters of the Act, function pursuant to the law of the state that appointed him or her, and that the appointment, tenure, removal and compensation of each Council member would be governed by the laws of his or her own state. As set forth in a Congressional report on the Act:

> "The arrangement contemplates the State officials on the Council would be authorized to carry out their functions under State law consistent with the scheme of the bill. Council members are deemed to be employees or officers of their respective States, and are subject to removal pursuant to, and compensated in accordance with, applicable State law." (H.R. Rep. No. 976 (Pt. II), 1980 U.S. Code Cong. and Adm. News 6038.)

Each Northwest State enacted legislation authorizing its entry into the compact;[5] pursuant to the state legislation, members were appointed; and on April 28, 1981, the Council came into existence.

3. Mandate To Develop the Plan.

The Act required the Council to prepare and adopt, within two years after it was established and its members appointed, "a regional conservation and electric power plan." (16 U.S.C. § 839b(d)(1).) The plan was to "set

---

[4] The Act also provided that in the event the agency was not established through an agreement among the states, or its formation was determined to be unlawful, a federal agency would be established in its place. (16 U.S.C. §839b(b).)

[5] Idaho Code § 61-1201 *et seq.* (Supp. 1984); Mont. Code Ann. § 90-4-401 *et seq.* (1983); Or. Rev. Stat., § 469.800 *et seq.* (1983); Wash. Rev. Code, § 43.52A.010 *et seq.* (1983). (Pet. Appendices "I", "J", "K", and "L".)

forth a general scheme for implementing conservation measures and developing resources . . . with due consideration by the Council for (A) environmental quality; (B) compatibility with the existing regional power system; (C) protection, mitigation and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival and propagation of anadromous fish; and, (D) other criteria which may set forth in the plan." (16 U.S.C. § 839b(e)(2).)

4. Preparation of the Plan.

The preparation of the original plan spanned a period of two years, from April 1981 through April 1983. It entailed widespread public participation and the expenditure of substantial time and effort by the Council, its staff, outside consultants, and advisors. Six major studies were prepared. Twenty-four key issues were identified with "issue papers" published on each of them. The Council also formed six advisory committees made up of more than 70 individuals who were experts in electric power issues. The committee members represented utilities, citizens and environmental organizations, the home building industry and other interests. Over two years, 182 public meetings were held throughout the Pacific Northwest. Approximately 400 individuals and organizations presented oral testimony during eight days of public testimony in the four Northwest states. The Council received 18,000 pages of comments on the draft plan from over 1,200 individuals and groups. Ultimately, in April of 1983, a plan ("the Plan") was adopted.[6] (Petitioners' Appendix, "M".)

[6] The Act contemplated that the planning process would be ongoing, specifying that "[t]he adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years." (16 U.S.C. § 839b(d)(1).) In fact, the Plan, including the model conservation standards, has been amended on several occasions since this litigation was filed. 50 Federal

(footnote continued on next page)

5. Model Conservation Standards.

The Act requires the Council to develop "[m]odel conservation standards . . . designed to produce all power savings that are cost-effective for the region and economically feasible for consumers . . ." (16 U.S.C. § 839b(f)(1).) Thus, a major focus of the Council's task in preparing the Plan was the development of model conservation standards for residential space heating. These standards constitute a critical component in meeting the energy needs of the region during the 20-year period addressed by the Plan.

The model conservation standards for residential space heating that were incorporated into the Plan specified electric energy performance budgets for space heating of residential structures. As determined by the Council, the region contains three climate zones: Zone 1 (west of the Cascade Mountains); Zone 2 (Oregon and Washington east of the Cascade Mountains); and Zone 3 (Idaho and Montana). The standards for each of the region's three climate zones were expressed as the maximum number of kilowatt-hours of electricity to be used for space heating per square foot per year. (Pet. App. "M", pp. 45-77.)

The Plan set forth, as exemplars, the building component specifications used to formulate the model standards. While these specifications may be adopted as prescriptive standards by any governmental or other body, such adoption is not mandatory. To quote the Plan itself:

> "Those entities which choose not to adopt and enforce the [model conservation] standards [for residential space heating] should prepare an alternative plan for achieving

---

(footnote continued from preceding page)

Register 5021, February 5, 1985; 50 Federal Register 30654, July 26, 1985; 50 Federal Register 40091, October 1, 1985; 51 Federal Register 7364, March 3, 1986, 51 Federal Register 16239, May 1, 1986. The Council also is currently in rulemaking with respect to the Plan. 51 Federal Register 42031 (Nov. 20, 1986).

savings that are comparable to those achievable through the use of the standards. The alternative plan may employ electric service requirements, rate designs, or any other technique for achieving conservation." (Pet. App. "M", pp. 62-63.)

6. Proceedings Below.

Under the terms of the Act, 16 U.S.C. § 839f(e)(5), the adoption of the Plan was reviewable through an original review proceeding in the United States Court of Appeals for the Ninth Circuit; and in July of 1983 Petitioners instituted such a review proceeding. Petitioners attacked the adoption of the Plan on the grounds that (a) it failed to comply with certain statutory criteria prescribed by the Act, specifically that conservation standards be "cost effective" for the region and "economically feasible" for consumers; (b) the Council, in adopting the Plan, failed to comply with state environmental laws;[7] and (c) the creation of the Council violated the Appointments Clause of the United States Constitution. (Petitioners' Opening Brief, pp. 15-55.)

After the review proceeding was instituted the United States intervened. The United States' position was that insofar as the authority of the Council implicated in this proceeding was involved, the creation of the Council was consistent with the Appointments Clause; and that while other powers with which the Council was vested raised a

[7] Petitioners did *not*, however, contend that the Council violated *federal* environmental laws. Rather, their sole reference to federal environmental laws was as follows:

"The Council is subject to state environmental law ... If this Court holds that the Council's exercise of authority violates the Appointment Clause ... and the Council is re-constituted through appointment conforming with the Clause, then the Council would have to prepare an EIS consistent with the requirements of the federal National Environmental Policy Act. *See* 42 U.S.C. §§ 4332, *et seq.*" (Petitioners' Opening Brief, p. 48, fn. 35.)

potential issue concerning the applicability of the Appointments Clause, those powers were not implicated in this proceeding and, therefore, the Court should not reach the constitutional questions that might be raised by their possible future exercise. (Brief of the United States as Intervenor, pp. 5-12.)

On April 10, 1986, the United States Court of Appeals for the Ninth Circuit, by a divided vote, denied the petition for review. (Pet. App. "A".)

a. The Majority Opinion.

The reasoning of the majority opinion in respects pertinent here was as follows:

(i) The Council Is An Interstate Compact Agency.

The Court of Appeals concluded that the Council is a body created pursuant to an interstate compact within the meaning of Article I of the Constitution, rejecting the Petitioners' contention to the contrary.[8]

---

[8] The Court observed that the intention of Congress that the Council not be a federal agency and not be controlled by the federal government "is clear from both the language of the statute . . . and from the legislative history." A "principal purpose of the Council," the Court explained, "is to represent state concerns about regional problems" and "Congress deemed it undesirable for a federal agency to represent state concerns to yet another federal agency." It noted that the indicia of state compacts are "establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness," and that "[t]he Council satisfies all these indicia."

The Court also rejected the Petitioners' argument that Congressional approval for the Council before the states agreed to form it and the Council's potential impact on federal agency were unusual features for a state compact agency and therefore rendered the Council a federal agency.

Finally, the Court observed that "[t]here is no bar against federal agencies following policies set by non-federal agencies" and "[t]he federal government has in fact agreed to be bound by state law in several areas." (Pet. App. "A", pp. 6-14.)

(ii) The Method of Appointment of Council Members Does Not Violate the Appointments Clause.

The Court of Appeals rejected Petitioners' contention that "even if the Council is a valid compact organization, the appointments clause of the United States Constitution requires that Council members be appointed not by the state governors . . . but by the President because the Council exercises significant authority over the federal government." The Court explained that the Appointments Clause "is addressed to the separation of . . . powers between the President and Congress" and it has never been held that "the appointments clause prohibits the creation of an interstate planning council with members appointed by the state."[9] (Pet. App. "A", pp. 15-16.)

---

[9] The Court of Appeals acknowledged that in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court stated that " 'any appointee exercising significant authority pursuant to the laws of the United States is an "officer of the United States" and must, therefore, be appointed' . . . by the President." It pointed out, however, that Petitioners' "claim that appointment of the Council members by the state governors violates *Buckley* . . . would outlaw virtually all compacts because all or most of them impact federal activities and all or most of them have members appointed by the participating states."

Under *Buckley*, the Court of Appeals explained, the appointments clause "applies to (1) all executive or administrative officers . . . (2) who serve pursuant to federal law . . . and (3) who exercise significant authority over federal government actions"; and "[u]nless all three prongs of the *Buckley* test are met, there is no violation of the appointments clause." The Council members, the Court of Appeals stated, "do not perform their duties 'pursuant to laws of the United States' " but, rather, "Council members perform their duties pursuant to a compact which requires both state legislation and congressional approval." The Court of Appeals pointed out that in the absence of "substantive state legislation, there would be no Council and no Council members to appoint"; that it is state law, "within parameters set by the Act," that governs "the Council members' appointment, salaries and administrative operations" of the Council; and that it is the states that "ultimately empower the Council members to carry out their duties."

The purpose of the appointments clause, as recognized in *Buckley*, the Court of Appeals noted, was "maintaining the separation of powers within the federal government" and "[t]his concern is not implicated

(footnote continued on next page)

(iii) The Plan Does Not Violate the Act.

The Court of Appeals explained that a court reviews the legal interpretation of a statute adopted by an administrative agency charged with " 'setting its machinery in motion' " deferentially; that the "preparation and consideration of the plan is a matter within Council authority over which the Act accords the Council considerable flexibility"; and that "therefore, we will defer to the Council's interpretations of § 839b [the portion of the Act governing preparation of the Plan] if reasonable." It concluded that the Council's interpretation of the requirement that conservation measures be " 'economically feasible for consumers' " was reasonable and, on that basis, sustained the interpretation. (Pet. App. "A", pp. 22-44.)

(iv) The Plan Does Not Violate State or Federal Environmental Laws.

The Court of Appeals rejected Petitioners' "claim that the 1983 plan violates state environmental laws . . . because the Council did not prepare an environmental impact assessment on the model conservation standards." It noted that an interstate compact agency "is considered the state-created agency of each state"; and "[a] state can impose state law on a compact organization only if the compact specifically reserves the right to do so." Accordingly, the Court of Appeals concluded, since "[n]either Washington nor Montana reserved such rights in their statutes agreeing to the establishment of the Council," state environmental laws were inapplicable. The Court of Appeals also determined that it was not necessary to "decide whether or to

---

(footnote continued from preceding page)

here . . . [since] [i]n this case, unlike *Buckley*, Congress has not arrogated to itself a power that would otherwise be exercised by the President"; and "[b]ecause Congress neither appoints nor removes the members of this Council, the balance of powers between Congress and the President is unaffected." (Pet. App. "A", pp. 15-20.)

what extent federal environmental laws . . . would apply . . . [since] [n]either BPA nor the Council has taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws." (Pet. App. "A", pp. 44-46.)

b. The Dissenting Opinion.

The dissenting opinion concluded that "the method of selecting the members of the Council violate[d] the Appointments Clause." The dissent reasoned that the Council was not an interstate compact agency because it lacked certain "classic indicia of an interstate compact": each of the state statutes authorizing the creation of the Council was not conditioned upon action by the states, "[a]ll four states are free to repeal their statutes unilaterally", and "the Council lacks . . . a state purpose".[10] The dissent also concluded that "[w]hile it is difficult to characterize the Council as an interstate compact agency, it is easy to characterize the Council as a federal agency" since it meets the criteria of an "agency" and "has a federal purpose and received its authority from federal law."[11] Finally, the dissent concluded that even if the Council is an

---

[10] The dissent stated that "the purpose of the Council is to guide the actions of the BPA" and that is not a state purpose — this despite its acknowledgment that "interstate compacts by their very nature have federal law implications and provide a vehicle for states to act in a manner in which a state may not act without Congressional consent, thus altering a state's sphere of authority."

The dissent also alluded to the fact that the Act "authorizes the creation of the Council on the consent of only three of the four statutes," yet the Act does not limit the geographical scope of the Council's responsibilities in such a case." (In fact, while it is true that the Act does not contain an *express* limitation, whether it contains an *implied* limitation would be a matter of statutory interpretation.)

[11] The dissent opined that the Council "receives its authority from federal law" even though it was *state* law that created the Council and even though it is *state* law which governs the appointment, tenure, removal and compensation of Council members.

interstate compact agency, "members of interstate compact agencies are not exempt from the appointments clause"; that "Congress may not usurp the President's power to nominate federal officers" and "Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties"; that "the Compacts Clause is not an exception to the Appointments Clause"; and that the Appointments Clause applies to anybody that derives "significant power and authority" from the federal law. It reasoned that various powers with which the Council is vested conferred upon the Council significant authority under federal law, and thus the creation of the Council entailed a violation of the Appointments Clause that could not be sanctioned on the basis of "cooperative federalism." (Pet. App. "A", pp. 46-79.)

c. The Petitions for Rehearing and Suggestions for Rehearing En Banc.

Both the Petitioners and the United States petitioned for rehearing and suggested a rehearing *en banc*. The Petitioners' position was that the judgment of the Court of Appeals was incorrect. (Pet. App. "T".)

The position of the United States, however, was that the *judgment* of the Court of Appeals was correct but that its *reasoning* was erroneous. The United States pointed out that "[t]he *only* authority of the Council directly involved in this case is its authority to . . . . recommend model conservation standards"; that "[t]hese standards impose no legal obligation on anyone"; and that "[w]e agree with the panel majority that Congress can constitutionally authorize an interstate compact that creates a regional planning agency meeting the above description, and that such an agency may have the planning and recommending powers exercised by the Council to date." It concluded that "[t]he

question how far Congress may authorize a state or regional agency to direct, rather than advise, a federal program without running afoul of the Appointments Clause is . . . one that is largely unexplored"; but that "[q]uestions that may arise in the future from the Council's exercise of its ongoing planning process are simply not ripe for decision in this case." (Pet. App. "S", pp. 5-9.)

Both petitions were denied.

II.

ARGUMENT

1. The Determination of the Court of Appeals That the Appointment of the Members of the Council by the States of the Pacific Northwest Does Not Violate the Appointments Clause Is Plainly Correct and Does Not Present a Substantial Constitutional Question.

The Petitioners' principal argument is that because the Act permits members of the Council to constrain certain actions of BPA, those members must be appointed in compliance with the Appointments Clause. That argument, however, is without merit. (Pet. App. "A.", pp. 11-20.)

a. The Purpose of the Appointments Clause Is to Maintain a Balance of Power Between the Executive and Legislative Branches of Government and Prevent an Aggrandizement of Power by the Latter Over the Former. Since the Members of the Council Are Not Appointed or Removable by Congress, No Such Aggrandizement of Power Is Threatened or Even Possible.

The Appointments Clause of the Constitution was motivated by concerns over "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). These concerns also are reflected in the Framers' separation of legislative, executive

and judicial powers within the federal government. The purpose of so dividing the federal government was to " 'diffus[e] power the better to secure liberty.' " *Bowsher v. Synar*, ... U.S. ....., 106 S.Ct. 3181, 3186 (1986), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). The Appointments Clause responds to these concerns by denying Congress a direct role in the appointment or removal of executive officials except within narrow limits. Leaving such power in legislative hands would, this Court has held, create executive officials who owe their allegiance to Congress, thereby threatening the Constitution's separation of powers. See *Bowsher v. Synar*, *supra*, 106 S.Ct. at 3182.

No Appointments Clause issue is raised in this case because all powers of appointment and removal are vested in the hands of the governors of the four Northwestern states. *See* 16 U.S.C. §839b(a)(2)(B), (3). Congress does not appoint or remove Council members. Its sole control over Council members (apart from reporting requirements, see 16 U.S.C. §839b(h)(12)(A)) is the constitutional power to amend the Act.[12] Accordingly, the evil the Founders sought to avoid — the aggrandizement of Congressional power — is not present.[13]

Bowsher v. Synar, 106 S.Ct. 3181, *supra*, confirms that the purpose of the Appointments Clause was to maintain a balance of power between the executive and legislative branches of government; for Congress to retain the power to appoint or remove executive officials would upset that

[12] This level of control, which exists in any congressional delegation of authority to any executive agency, is wholly consistent with the Constitution. *See Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 954-55 (1983); *Bowsher v. Synar*, ... U.S. ....., 106 S.Ct. 3181, 3182 (1986).

[13] Indeed, far from threatening the interests that motivated the Founders to provide for a separation of powers within the federal government, the Act diffuses governmental power outside the federal government.

balance. It was because the Gramm-Rudman Act reserved to Congress the power to remove an official exercising executive powers that the legislation was declared unconstitutional.

The Court of Appeals' opinion in this case employed the same Appointments Clause analysis utilized in *Synar*. As the Court of Appeals explained, Congressional aggrandizement of its own power could not occur because Congress neither appoints nor removes members of the Council. The balance of power between Congress and the President is unaffected.

b. The Appointments Clause Applies Only To The Appointment of Federal Officers, and Unless Members of the Council Are Federal Officers the Appointments Clause Could Not Be Applicable to Them. Since Members of the Council Hold Office and Exercise Authority Pursuant to State Law, Obviously They Are Not Federal Officers.

The Appointments Clause applies only to the appointment of "Officers of the United States." Hence, unless the members of the Council are federal officers, the Appointments Clause could not be applicable to them. An examination of the relevant legislation leads to the conclusion that the members of the Council are not federal officers.

A basic purpose of Congress in authorizing the creation of the Council was to permit the representation of *state* concerns about a regional problem — not to create an agency that would reflect *federal* concerns. As the Court of Appeals noted:

> "One of the principal purposes of the Council is to represent state coneerns about regional problems; Congress deemed it undesirable for a federal agency to

represent state concerns to yet another federal agency." (Pet. App. "A," pp. 7-8.)[14]

Rather than creating an agency itself, Congress consented to the formation of an interstate agency through agreement among the states of the region — an agency that Congress expressly provided in the Act would *not* be a federal agency; an agency that would not and could not come into existence unless the states of the region enacted appropriate enabling legislation; and an agency whose members would, within the parameters of the Act, function pursuant to state law and whose appointment, tenure, removal and compensation would be governed exclusively by the laws of the respective appointing state. To quote a Congressional report on the Act:

> "The arrangement contemplates the State officials on the Council would be authorized to carry out their functions under State law consistent with the scheme of the bill. Council members are deemed to be employees or officers of their respective States, and are subject to removal pursuant to, and compensated in accordance with, applicable State law." (H. R. Rep. No. 976 (Pt. II), 1980 U.S. Code Cong. and Adm. News 6038.)

In short, members of the Council hold office and exercise authority pursuant to state law; obviously they are not federal officers.[15]

---

[14] During the course of the floor debates, for example, a Senator representing one of the states of the Pacific Northwest stated:

> "The Pacific Northwest does not need and candidly will not suffer lightly a federally imposed regional planning process with apparent input from Washington acting as a federal agency." (126 Con. Rec. 30181.)

[15] If, however, the states had failed to give the required consent to the creation of the Council or its formation was determined to be unlawful, a federal agency would be established in its place. See footnote 4, *supra*. Hence if Petitioners were successful in having the Council declared unconstitutional, the effect would be to expand the federal bureaucracy through the creation of a new federal agency.

c. The Fact That Federal Law Permits An Appointee to Constrain Federal Power Does Not Transform That Appointee Into A Federal Official For Purposes of the Appointments Clause.

As indicated *supra*, the principal thrust of the Petitioners' attack upon the Court of Appeals' decision is that whenever federal law permits an appointee to constrain significant federal power, that law necessarily renders the appointee a federal official for purposes of the Appointments Clause; and since the Council has the power to constrain the conduct of a federal agency, BPA, the members of the Council are federal officials.

Petitioners are wrong for several reasons.

To begin with, there is abundant judicial sanction, including decisions of this Court, for federal law authorizing non-federal officials to constrain federal power; and there has never been the remotest suggestion that the authorization would transform the appointee into a federal official for purposes of the Appointments Clause. As noted by Professor Tribe (who was "of counsel" to the Council in the Court of Appeals) in *Constitutional Choices* 72 (1985):

> "Neither is there, nor could there be, any general principle that any one to whom a federal statute delegates a significant decision-making role on which the rights or duties of persons outside Congress may depend becomes, by virtue of such delegation, an 'Officer of the United States' within the meaning of the Appointments Clause . . . If such a principle exists, then Congress could not 'confer upon the states' — which are surely not United States 'Officers' — an authority to restrict the flow of interstate commerce which they would not otherwise enjoy. And the private individuals and groups to whom decision-making roles were delegated in *Currin v. Wallace*, [306 U.S. 1 (1939)] and *United States v. Rock*

> *Royal Co-Operative*, [307 U.S. 533 (1939)], for example, would have been United States Officers whose failure to be appointed in accord with Article II would have constituted fatal constitutional flaws in the statutory schemes upheld in those two landmark decisions."[16]

Moreover, interstate compacts created under Article I of the Constitution characteristically constrain federal power. They are, by definition, agreements that tend "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United

---

[16] In *California v. United States*, 438 U.S. 645 (1978), for example, this Court upheld a statutory scheme which required the Secretary of the Interior, in executing his responsibilities as administrator of a federal water power project, to comply with all conditions imposed by a state agency. The potential constraints on the Secretary were at least as great as those that the BPA may be subjected to under the Act. Nonetheless, the Court, characterizing the challenged Act as a "leading example" of "cooperative federalism," held that the only constitutional limitation on the state agency was that it could not impose any constraints on the federal program which were "inconsistent with congressional directives." (*Id.* at 650.) Accord: *Hancock v. Train*, 426 U.S. 167, 178-80 (1976).

See also Opp Cotton Mills, Inc. v. Administrator, etc., 312 U.S. 126, 134-35, 144-47 (1941) (under the Fair Labor Standards Act, minimum wages are set by a federal officer "in collaboration with an industry committee" composed of private individuals; "no wage is fixed which is not recommended by the Committee"); *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577-78 (1939) (under the Agricultural Marketing Act of 1937. the Secretary of Agriculture's "market orders" regulating prices and marketing practices of agricultural products must be approved by a specified percentage of producers and handlers of products); *Currin v. Wallace*, 306 U.S. 1 (1939) (under the Tobacco Inspection Act of 1935, the Secretary of Agriculture may designate tobacco markets and establish inspection and grading standards for such markets, but the effectiveness of proposed regulations is conditioned upon approval by two-thirds of the growers in the designated area); *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U.S. 281 (1908) (the Interstate Commerce Commission is directed to promulgate standards to be set by the American Railway Association and to be enforced against all common carriers in interstate commerce); *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918) ("the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice").

States." (*Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)); or, to put it another way, they are agreements " 'which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution. . . .' " (*United States Steel Corp. v. Multistate Tax Com'n.*, 434 U.S. 452, 466 (1978).) Indeed, the purpose of the Constitution in requiring Congressional consent to the formation of an interstate compact is to retain ultimate federal authority over *state* actions that might constrain *federal* power. As explained in *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981):

> "By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative *state* action that might otherwise interfere with the full and free exercise of federal authority." (Emphasis added.)

Congress has, on a number of occasions, consented to the formation of state compact agencies the purpose of which is to limit federal agencies. *See, e.g.*, the Boulder Canyon Project Act of 1928, 45 Stat. 1062, 43 U.S.C. §7g; Upper Colorado River Compact Act, 70 Stat. 110, 43 U.S.C. §620m; Susquehanna River Basin Compact, Pub.L.No. 91-575, §12.1, 84 Stat.1509, 1424 (1970); Delaware River Basin Compact, Pub. L. No. 87-328, §11.1(b), 75 Stat. 688, 701 (1961). If Petitioners' argument were extrapolated to its logical conclusion, it would mean that all officials of agencies created pursuant to interstate compacts — and possibly all persons charged with implementing interstate compacts whether or not they were members of interstate compact agencies — would have to be appointed in compliance with the Appointments Clause.

Interstate compacts obviously play an important role in addressing regional problems that transcend state boundaries. Since no state could be expected to utilize the compact mechanism if the officials involved would be appointable, removable, and regulatable by the federal government, application of the Appointments Clause could "spell the death knell for interstate compacts." *People v. South Lake Tahoe*, 466 F.Supp. 527, 535-36 (E.D. Cal. 1978.) Is it conceivable that the Framers would have intended the Appointments Clause to produce such an anomalous result?[17]

In summary, Petitioners' assertion that the appointment of the members of the Council by the states of the Pacific Northwest violates the Appointments Clause does not present a substantial constitutional question.[18]

---

[17] Interstate compacts are particularly useful in addressing regional issues related to electric power systems and interstate rivers. As Professors Frankfurter and Landis observed more than half a century ago with regard to the use of compacts to deal with regional problems:

> "With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies. These produce regional problems calling for regional solutions.
>
> * * *
>
> Perhaps the sharpest emergence of this problem is due to the widespread development of electric power." Frankfurter & Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 Yale L.J. 685, 708 (1925).

[18] Petitioners also contend that the powers of the Council conflict with the "principle of national supremacy" (Pet., p. 17). As Petitioners themselves concede, however, Congress has the power to consent to state regulation of federal programs and activities (Pet., p. 19 n. 12). Although Petitioners suggest that there might be some limits on congressional power to authorize state regulation of federal activities, Petitioners have cited no authority which suggests, much less holds, that Congress lacks the power to allow state officials to exercise authority similar to that conferred on the Council. Such cooperative arrangements between Congress and the States are familiar examples of Congress' exercise of its plenary power under the "necessary and proper" clause.

(footnote continued on next page)

2. Even if the Determination of the Court of Appeals that the Appointment of the Members of the Council By the States of the Pacific Northwest Does Not Violate the Appointments Clause Were Not Plainly Correct, the Grant of Certiorari Would Still Be Inappropriate.

The Court of Appeals' decision that the appointment of the members of the Council by the states of the Pacific Northwest does not violate the Appointments Clause is plainly correct and hence no substantial Appointments Clause question is presented. Even assuming, however, that a substantial constitutional question were presented, the granting of certiorari would still be inappropriate.

a. The Decision of the Court of Appeals Does Not Conflict with Any Decision of this Court or of Any Other Circuit.

A significant criterion for granting or denying petitions for certiorari is, of course, the need to promote uniformity of decisions. Here, the Court of Appeals' decision does not conflict with any other Supreme Court or Court of Appeals' decision. Indeed, it is supported by a long line of decisions of this Court, including, as explained *supra,* the recent decision of the Court in *Bowsher v. Synar*, ... U.S. ....., 106 S.Ct. 3181 (1986).

(footnote continued from preceding page)

Moreover, Petitioners' assertion that "limitations are particularly appropriate when the regulation of the national right or power at issue is a product of combined congressional-state action" is manifestly untenable. Surely the principle of federal supremacy is less threatened by a scheme of "cooperative federalism" than by a statute granting to the states exclusive authority to regulate matters of joint federal-state concern. Beyond that, any federal supremacy concern is satisfied by the requirement that the Council "carry out its functions and responsibilities in accordance with" the requirements and provisions of the Act.

b. This Court Grants Certiorari to Alter Judgments, Not Merely to Revise Opinions. Here the Intended Beneficiary of the Appointments Clause, the Executive Branch of the Federal Government, Has Taken the Position that the Judgment of the Court of Appeals is Correct.

This Court reviews *judgments*, not *opinions*. As noted in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945): "Our power is to correct wrong judgments, not to revise opinions . . . ." Accord: *Mississippi University for Women v. Hogan*, 458 U.S. 718, 720 (1982) ("we review judgments, not opinions"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements of opinion.") Thus if a *judgment* is correct, certiorari should not be granted merely because the *opinion* on which it was predicated was arguably overly broad or arguably contained erroneous statements.[19]

Here, the intended beneficiary of the Appointments Clause is the Executive branch and presumably it, if anyone, would have a strong incentive to challenge the judgment of the Court of Appeals if it believed that the *judgment* was wrong. Yet the Executive has taken the position that the judgment of the Court of Appeals is correct. This Court should not expend its resources in reviewing a case in which, even if the reasoning of the Court of Appeals were found to be erroneous, the probable outcome would merely be an advisory opinion that did not alter the judgment between the parties.

[19] Under Article III of the Constitution the jurisdiction of this Court does not extend to rendering advisory opinions. A Supreme Court decision that would not alter a lower court's judgment but only correct the reasoning which impelled it is, in essence, an advisory opinion.

3. The Council, In Promulgating The Plan, Did Not Violate State Or Federal Environmental Laws Because (i) Compact Agencies May Only Be Subjected To State Environmental Laws To The Extent That The Compact So Provides, And The Compact Creating The Council Did Not Provide For The Application Of Such Laws; and (ii) The Federal Environmental Law That Petitioners Contend Is Applicable Applies Only To Federal Agencies And The Act Expressly Provides That The Council Is Not A Federal Agency.

a. No Substantial Issue Is Raised Regarding Compliance With State Environmental Laws.

As the Court of Appeals stated, an interstate compact agency may be made subject to state environmental laws only if the compact specifically so provides. See Pet. App. "A", pp. 44-45, citing *People v. South Lake Tahoe*, 466 F.Supp. 527 (E.D. Cal. 1978).[20] None of the state statutes that created the Council reserves the right to apply state environmental laws to the Council or the Plan. See Idaho Code § 61-1201 *et seq.* (Supp. 1984); Mont. Code Ann. 90-4-401 *et seq.* (1983); Or. Rev. Stat., § 469.800 *et seq.* (1983); Wash. Rev. Code, § 43.52A.010 *et seq.* (1983).[21]

[20] In *South Lake Tahoe*, the Court noted that application of state environmental law would be precluded "unless the compact reserves to [the state] the rights to impose such a requirement on the bi-state agency." (466 F.Supp. at 537.) Although *South Lake Tahoe* involved an instance in which a state environmental law was applied to an interstate compact agency, it is instructive here by way of contrast. The Tahoe Regional Planning Act at issue in *South Lake Tahoe* expressly authorized "political subdivisions," to adopt and enforce higher regulatory standards with respect to projects coming before the Tahoe Regional Planning Agency (TRPA). *See*, 466 F.Supp. at 537. In contrast, there is no similar authorization in this case. In *South Lake Tahoe*, the California Environmental Quality Act applied expressly to "regional agenc[ies]." *See* 466 F.Supp. at 537. Here, in contrast, no state statute applies to regional or interstate agencies.

[21] Only two of the Council's four member states require agencies of state government to prepare environmental impact statements. Wash. Rev. Code § 43.21C.030-31;§ 43.19.504(1); Mont. Code Ann., 75-1-

(footnote continued on next page)

Hence, the applicability of *state* environmental laws to the Council clearly is not an issue that merits review by this Court.

b. No Substantial Question Is Raised Regarding the Applicability of Federal Environmental Law.

In the Court of Appeals, Petitioners raised no issue regarding the applicability of federal environmental law to the Council. (See footnote 7, *supra*.) They should not be eligible to raise the issue now in this Court.

Assuming that they could do so, however, the National Environmental Policy Act (NEPA) applies *only* to "agencies of the Federal Government." (42 U.S.C. § 4332(2)(C)). The Act expressly provides that the Council is not to "be considered an agency or instrumentality of the United States for the purpose of any Federal law." (16 U.S.C. § 839b(a)(2)(A).)

4. The Determination Of The Court Of Appeals That The Plan Does Not Violate The Requirement Of The Act That Conservation Measures Be "Economically Feasible" For Consumers Is Plainly Correct. In Any Event, Whether The Plan Does Or Does Not Violate That Requirement Is An Issue Of Limited Significance That Does Not Merit Review By Certiorari.

Petitioners purport to seek certiorari in order to determine whether the Council, in adopting the Plan, violated the requirement of the act that conservation measures be "economically feasible for consumers." (Pet., pp. 26-30.) The determination of the Court of Appeals that the Plan does not violate the requirement that conservation measures be "economically feasible for consumers" is, for

---

(footnote continued from preceding page)

201 (1983). As an agency formed by a compact between the states, the Council cannot be considered a state agency for purposes of these statutes.

the reasons stated by the Court of Appeals, plainly correct. (See Pet. App. "A", pp. 21-44.)[22]

Be that as it may, however, whether the Plan does or does not violate this requirement is obviously an issue of limited significance that does not warrant review by certiorari.

III

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN M. VOLKMAN
Acting General Counsel

AARON M. PECK
MCKENNA, CONNER & CUNEO

Attorneys for Respondent Northwest Power Planning Council

[22] The definition of "economically feasible for consumers" is currently being reviewed by the Council. (51 Federal Register 42033, November 20, 1986.)